U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 23 November 2004

Case No.: 2004-LHC-427

OWCP No.: 07-165586

In the Matter of:

ANDRE S. RICHMOND,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer.

APPEARANCES:

DEBORAH BASS-FRAZIER, ESQ.,
On Behalf of the Claimant

DONALD MOORE, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"). The claim is brought by Andre S. Richmond, "Claimant," against Northrop Grumman Ship Systems, Inc. ("Northrop"), "Employer." Claimant sustained a lower back injury during his employment with Northrop on October 17, 2002. Claimant asserts that he is entitled to permanent total disability benefits for his unscheduled back injury. Employer argues that Claimant is only entitled to permanent partial disability benefits

and additionally requests relief under the Section 8(f) Special Fund. A hearing was held on June 9, 2004 in Mobile, Alabama, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1; and

2) Claimant's Exhibits Nos. 1-5; and

3) Employer's Exhibits Nos. 1 -14.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. At the time of the alleged injury, the Claimant was covered by the LHWCA since he was engaged in construction of Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Northrop Grumman Ship Systems/Ingalls Operations.

2) The date of Claimant's injury/accident was October 17, 2002.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) Employer was advised of the injury on October 17, 2002.

6) A Notice of Controversion was filed on November 26, 2002.

7) An Informal Conference was held on November 14, 2003.

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[2] JX-1.

8) Temporary total disability was paid from November 20, 2002 through November 21, 2003 and temporary partial disability has been paid from November 22, 2003 through the present. The total compensation benefits paid to date equal $34,300.20.

9) Claimant suffers permanent disability.[3] Dr. Allen assigned a thirteen percent permanent partial impairment rating to the body as a whole.

10) The date of maximum medical improvement is September 17, 2003.

ISSUES

The unresolved issues in these proceedings are:

(1) Nature and Extent of Disability;

(2) Average Weekly Wage;

(3) Second Injury Relief Fund; and

(4) Entitlement to Attorney's Fees and Other Applicable Assessments.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Andre S. Richmond

Andre Richmond is forty-nine years old and was employed as a welder for Northrop at the time of his injury. He suffered an injury to his back on October 17, 2002. That day he was carrying a twenty to fifty pound welding box that contained a full roll of wire in one hand and a welding whip in the other hand. He testified that as he passed through a doorway to fix a weld on a ship, something caught on the door. He lost his balance, twisting his body in the process. He testified that he felt sharp pains in his back running down his right leg, which later became numb. Mr. Richmond finished the job, but complained to his co-worker, Willie, of the pain. After finishing the job, he reported his injury to his supervisor, Mac Knight. He attempted to continue to work, but stopped due to pain. Mac Knight issued a hospital pass to him. He was seen by Dr. Woofie, who applied a heat pack, gave him some medication, and restricted him from work. TR 13, 21-24.

[3] Employer disputes the percentage of impairment.

Mr. Richmond testified that he returned to work when Dr. Woofie released him, but his pain worsened. Dr. Woofie referred him to an orthopedic. Mr. Richmond chose Dr. Herbert Allen, III who gave him injections, medication and performed an MRI. Dr. Allen tried therapy, but Mr. Richmond's back showed no improvement. Dr. Allen then scheduled Mr. Richmond to have surgery on February 17, 2003. However, the surgery was not performed on this date because Northrop requested a second opinion. Mr. Richmond testified that Northrop chose Dr. West, who eventually agreed to the surgery. Surgery was performed on June 3, 2003. Mr. Richmond testified that initially the surgery gave him some relief, but the pain returned and worsened when he started therapy. He testified that he currently experiences chronic pain and numbness in his right leg and sharp pains in the L-4 and L-5 area of his back. He stated that he experiences pain every day. Mr. Richmond admitted that he underwent a functional capacity evaluation ("FCE") post-surgery before he was released to work that documented symptom magnification and submaximal effort on his part. TR 24-26, 57-58.

Mr. Richmond testified that when Dr. Allen released him to return to work, he attempted to return to Northrop; however, Northrop told him they did not have any available jobs compatible with his restrictions. He was restricted from stooping, crawling, kneeling, bending and lifting over ten pounds. Mr. Richmond testified that he felt dejected when he could no longer work for the company with which he had been employed for twenty-five years. Mr. Richmond testified that throughout his search for employment, he continuously checked with Melinda Wiley at Northrop to see if an appropriate job had opened. TR 26-28.

Mr. Richmond described his pre-injury education and work history as follows. He completed one and a half semesters at community college in physical education and business administration before leaving to work at Ingalls as a shipfitter helper in April 1973. He was terminated from Ingalls after six months and began working at Bender's as a shipfitter. He then returned to Ingalls in February 1974 and remained there until December 1977. During this time period, he obtained his welding certification by going through a program after work and began working as a welder in late-1974. Beginning in December 1977, he worked for Kaiser Aluminum for eight months as a welder. He returned to Ingalls/Northrop for the last time on August 23, 1978 and has worked there as a welder through the date of his injury in October 2002. TR 13-17, 20.

Mr. Richmond testified that throughout his work history with Northrop, he typically worked eight hours per day, five days per week, Monday through Friday. He was paid time and a half if he worked over eight hours a day or if he worked on Saturday, and he was paid double-time if he worked on Sunday. He testified that to receive pay for a holiday, an employee was required to work the five hours before the holiday and the six hours after it. Vacation time was earned according to seniority, and employees were

allowed to choose whether to use the vacation time or to receive monetary compensation instead. Mr. Richmond testified that he has done both. He testified that when an employee worked forty consecutive working days, he became eligible for bonus pay. Mr. Richmond testified that he earned bonus pay frequently. TR 17-19.

Mr. Richmond's last position with Ingalls was work leaderman/assistant to the electrical department. He testified that he reached the status of work leaderman in 1998 because he had multiple certifications and was capable of teaching other welders. He held a certification to sign off on Navy welding jobs. As assistant to the electrical department, he performed any welds necessary in the electrical department. Mr. Richmond testified that he also occasionally served as supervisor at Ingalls. TR 19-21.

Mr. Richmond began his post-injury job search in October 2003. He went to the Alabama State Employment Office and submitted an application with the Mobile County Personnel Board; he additionally contacted four companies in person, submitting one application. Mr. Richmond testified that he went to the Alabama State Employment Office on October 2, 2003 of his own volition. There were no jobs available at that time, and he was told to check again later. He also went on his own accord to the Mobile County Personnel Board. There he took a test to qualify for a position as a messenger for the Mobile Water System. He received a letter stating that he ranked sixty-seventh on the list, and he has not been contacted since. Mr. Richmond next started searching for welding jobs that would allow him to remain stationary or jobs dealing with welding supplies. On October 10, 2003, he contacted Taylor Wharton, a welding supply company. He spoke with Kelly Ingram in person who advised him that they were not accepting applications at the time. That same day, he spoke with Lillie Powell of USA Blocks and submitted an application for a job that required a commercial driver's license ("CDL"). On October 10, he also spoke with Jayla Flicker of Air Gas, a welding supply company, and was told they were not accepting applications. He additionally contacted Ready Welding Services that day, which was not hiring either. TR 29-36.

On November 10, 2003, Mr. Richmond contacted three job leads provided to him by Mr. Sanders, submitting two applications. He spoke with Mike Dunbar of Magnolia Security, who told him that they were not accepting applications. He spoke with Martha Jordan Securitas Security, formerly Pinkerton Security, and submitted an application that was to be kept on file for one year. He also went to Vincent Guard Services in person and spoke with Peggy Gorman. He submitted an application and took a written test, but has not since been contacted. TR 36-38.

In December 2003, Mr. Richmond again returned to Northrop on the fifteenth and nineteenth to inquire about jobs. He also contacted two other companies in person on December 22, 2003. He went to Will-to, Inc., a welding company, which was not accepting applications at the time. That same day he contacted Nordon Smith, a welding supply company, but its position required a CDL. TR 39-40.

In January 2004, he returned to Northrop on the sixth and the fifteenth to inquire about available jobs. On January 15, 2004, he formally resigned from Northrop in order to receive his pension. On January 15, 2004, he contacted three companies, submitting one application. He went to Pyramid Welding and Fabrication, but no one answered the door. That same day he went to PSI Sales and spoke with Laura Skinner. He submitted an application and took a written test. He was told he would receive a call if any position arose but that his physical condition might affect his employment. He also went to Steel City, which was not accepting applications. TR 40-43.

In February 2004, Mr. Richmond contacted four additional companies, submitting two applications. On February 4, 2004, he submitted an application to Silver Ships, a shipbuilding company, but was advised that he was not physically able to perform the job. He also contacted Reintjes Services that same day, which was not accepting applications. On February 8, 2004, he went to Shore Acres Nursery because he thought he would be physically able to care for plants. However, he learned that the job positions there would be too physically demanding, except for a truck driving position that required a CDL. On February 9, 2004, he contacted Mobile Greyhound Park in reference to a security job, because it was similar to the jobs Mr. Sanders had suggested. However, they were not accepting applications at the time. On February 17, 2004, he contacted KAP Alabama Security Services in person and spoke with Carl King, who told him the job would be too physically demanding. Nevertheless, Mr. Richmond submitted an application and was never contacted. He testified that he returned to the Alabama State Employment Office three more times, and never received work. He also returned to the County Personnel Board to no avail. TR 43-47.

On March 4, 2004, Mr. Richmond went to the Texaco Service Station and spoke with Karen Jackson who advised him that they were not taking applications. Mr. Richmond followed up on his applications with KAP Security and Mobile Greyhound Park, but nothing was available. Mr. Richmond testified that he began feeling depressed about his inability to get a job. It was at this point that he applied for disability. TR 50-52.

Mr. Richmond testified that he did not want to give up his welding occupation. He also stated that he never volunteered information about his injury when applying for employment. However, it often came up when he was asked why he left his previous job. Mr. Richmond testified that Northrop had a combine shop where the welders could sit at a table. He had inquired to Ms. Wiley about working at the shop, but was advised that there was no opening there at that time. TR 41, 43.

The Department of Labor had engaged Mr. Ronnie Smith to assist him in finding a job or a training program. On February 22, 2004, Mr. Richmond obtained a course catalog from Bishop State Community College, pursuant to the advice of Mr. Smith, but did not sign up for any course work because he did not see anything in which he was interested. He testified that he had been interested in taking classes at Alabama A&M to be a certified welding instructor; however, he would have been responsible for room and board and the certification could not be completed in one summer because it required more than fifteen credit hours. Mr. Richmond testified that he did not feel that he could sit in the classroom all day and handle a full class load. Mr. Smith discontinued his services with Mr. Smith in March 2004. Mr. Richmond recalled that he had been told that his status was on hold until he was contacted again. TR 47-50, 56.

Mr. Richmond testified that he did not contact any of the three jobs listed in Mr. Sanders' labor market survey of June 2, 2004 because he was receiving social security disability. He testified that he did not apply for any jobs since he received social security disability. TR 52-53, 67.

Mr. Richmond testified that he is currently taking Lortabs, Murotin, Bextra for inflammation and Soma as needed for sleep. He testified that his sleep habits are bad and, he sleeps three to four hours a day at most. He testified that his medications make him groggy day and night. TR 53-55.

Mr. Richmond testified that prior to his most recent injury, he had a work-related back injury, a left knee injury that was work-related, and a right leg injury that was not work-related. Dr. Seltzer treated him for his prior back injury, which was a bulging disc at L4 and L5, and he missed approximately seven months of work due to the injury. Mr. Richmond testified that when Dr. Allen performed surgery in response to his most current back injury, it was also on L4 and L5. He testified that he had three surgeries on his left knee and missed some time from work in connection with these surgeries. He testified that Dr. Crotwell treated his non-work-related right knee injury. TR 73-75.

II. VOCATIONAL EVIDENCE: Reports

Tommy Sanders

Mr. Sanders is a certified rehabilitation counselor with Sanders & Associates, Inc. On November 6, 2003, Mr. Sanders issued a letter to Mr. Richmond notifying him of three security guard positions for which he qualified. He provided Mr. Richmond with the address and phone number of each company. Vinson Guard Service in Mobile was hiring a full time security guard with wages of $5.15 per hour. Duties included patrolling access to a medical facility and checking parking lots and other areas. The work entailed negligible lifting with frequent standing and walking and occasional sitting.

Securitas Security in Mobile was accepting applications for a full time security guard position that paid $5.15 per hour. Duties included patrolling access to a health care facility by monitoring entrances and exits via closed circuit TV. The work entailed frequent standing and walking, occasional sitting and lifting up to ten pounds. Magnolia Security in Pascagoula was accepting applications for full and part time security guards for sixteen to forty hours per week at a wage rate of $5.75 per hour. Duties ranged from gate guard duties to foot patrol and vehicle patrol. The work entailed varying degrees of sitting, standing and walking with negligible lifting. RX-9, pp. 1-2.

On November 11, 2003, Mr. Sanders issued a Vocational Assessment to Jessica Walling, the claims adjuster for Northrop's insurer. In the report, he noted that Mr. Richmond contacted six or seven employers in the month of October, including registering with the Alabama Employment Service and pursuing a job through the Mobile Personnel Board. He completed three applications: one with the Alabama Employment Service, one with USA Block Company that required a CDL, and one with the Mobile Personnel Board. Mr. Sanders noted that he recommended to Mr. Richmond to follow up with the employers and to discuss his capabilities as well as limitations with the employer while maintaining a positive approach. He recommended contacting Ms. Melinda Wiley regarding light duty work available at Northrop. His report included a listing of jobs there were available on or about September 17, 2003. He determined that Securitas and Vinson Security were hiring at that time and that Central Parking in Mobile was hiring a sixteen to twenty-four hour per week parking lot attendant with wages of $5.15 per hour. RX-9, pp. 3-7.

On May 28, 2004, Mr. Sanders sent correspondence to Ms. Walling in response to her request for a follow-up labor market survey. His survey determined three potential employment opportunities. Econo Lodge in Mobile was hiring a full time desk clerk trainee at a wage rate of $6.00 per hour. Duties included checking guests in and out, assigning rooms, accepting payments, balancing the cash drawer and answering calls. Basic math was required. The work required lifting five to ten pounds occasionally, sitting, standing, walking, stooping and infrequent bending. Donovan's Car Wash in Mobile was hiring a full-time cashier at a wage rate of $5.15 per hour. The work entailed lifting five pounds occasionally, occasional pushing and pulling of five to ten pounds, occasional standing and walking with infrequent bending. Standard Parking in Mobile was hiring a thirty-two plus hour parking lot attendant/cashier at a wage rate of $5.50 per hour. Duties included collecting fees and cleaning the parking lot. Cleaning the parking lot required approximately thirty minutes per eight hour shift and entailed infrequent bending and stooping. The physical requirements were sitting or standing, lifting five pounds occasionally, and pushing and pulling five to ten pounds occasionally. All of these employers voiced a willingness to consider an individual with Mr. Richmond's profile. RX-9, pp. 11-12.

Ronnie Smith

Mr. Smith, a vocational rehabilitation specialist provided through the OWCP Longshore Program, began meeting with Mr. Richmond in January 2004. His report of February 28, 2004 indicated that Mr. Richmond had the goal of obtaining training as a welding instructor at Alabama A&M College. However, Mr. Smith determined that the college did not offer such training, but only offered continuing education certification. He noted that Mr. Richmond had been slow to go to the local junior college to obtain information about training programs available there. Mr. Smith's March 12, 2004 report indicated that Mr. Richmond had gone to the junior college to obtain a list of courses, but did not see any course work he felt he could do. Mr. Smith noted that Mr. Richmond appeared not to feel well and expressed that he was mentally worn down and did not feel physically capable of returning to any form of work. As of March 2004, Mr. Smith placed the file in an interrupted status. RX-10.

III. MEDICAL EVIDENCE: Reports

1. Present Injury

Herbert Allen, III, M.D.

Dr. Allen performed a decompressive laminectomy on the right side of Mr. Richmond's back at L4-5 on June 3, 2003. On July 22, 2003, Dr. Allen treated Mr. Richmond with injections to relieve his pain symptoms, continued to prescribe Lortab and Soma, and started him on physical therapy. He continued to keep Mr. Richmond off of work. On September 17, 2003, Dr. Allen opined that Mr. Richmond had reached maximum medical improvement. He rated him at thirteen percent permanent partial impairment of the whole body. He released him to work with the following work restrictions: permanent light duty work with no heavy lifting greater than ten pounds with both hands, no climbing, crawling, squatting, and kneeling. RX-5, pp. 1, 9, 12.

J. L. West, M.D.

Dr. West saw Mr. Richmond on February 26, 2003 at the request of Employer for a second opinion regarding Dr. Allen's recommendation of back surgery. Dr. West recommended that a CT scan and myelogram first be done to determine if there was nerve encroachment at L4-5. The record contains no other documentation from Dr. West. Employer submitted a letter addressed to Dr. West, notifying him that Dr. Allen had performed the CT scan and myelogram and maintained his recommendation for surgery; however, there is no response from Dr. West. RX-6.

2. Past Injuries

Roger M. Setzler, M.D.

Dr. Setzler treated Mr. Richmond for his previous back injury of May 4, 2000. The record contains documented visits from August through November of 2000. Dr. Setzler performed an MRI, which revealed that Mr. Richmond had "a very small central right paracentral bulging of the L4-5 disc." He was treated with an epidural block. On November 13, 2000, Dr. Setzler released Mr. Richmond to resume his normal work activities and noted that he was "essentially at MMI at this point in time with no long term disability." RX-12, pp. 6-7.

Guy L. Rutledge III, M.D.

Dr. Rutledge treated Mr. Richmond for his calf injury of May, 3 1990. He had an arthroscopy and in May 1990 was restricted from climbing, squatting, stooping or kneeling. Dr. Rutledge maintained a ten percent permanent anatomic impairment to the lower extremity that had been assigned in 1988. On December 5, 1991, he noted that Mr. Richmond had reached MMI with no additional permanent partial disability since April of 1991. RX-12, pp. 8-10.

William A. Crotwell III, M.D.

Dr. Crotwell treated Mr. Richmond for his right elbow injury of December 4, 1996. He was restricted to light duty work until Dr. Crotwell opined that he was at MMI as of May 27, 1997. Dr. Crotwell ultimately assigned a permanent partial impairment rating of two percent to the right upper extremity and issued no work restrictions. RX-12, p. 14.

3. Combined Injuries

Employer submitted a letter dated June 9, 2004 from Ms. Walling, claims adjuster for Employer's insurer, to Dr. Allen where she details Mr. Richmond's medical history of previous injuries and asks Dr. Allen to agree or disagree with two closing statements. Notably, some of the medical history detailed by Ms. Walling is missing from this Court's record. Specifically, Ms. Walling states that Mr. Richmond injured his left knee on June 26, 1998 and received a 5% PPD to the left leg as a result. This information does not appear in the record. The first statement, with which Dr. Allen concurred, reads "[B]ased on a reasonable medical probability, all of Mr. Richmond's previous injuries listed above combines with and contributes to the effects of his back injury that occurred on 10-17-02 to render him materially and substantially more disabled than he would have been as a result of his latter back injury alone." The second statement, with which Dr.

Allen concurred, reads, "Mr. Richmond's 2% PPD to the right arm (1% to the body as a whole), the 15% total PPD to the left leg (6% to the body as a whole), and the 13% to the body as a whole (assigned by [Dr. Allen]) combines for a total of 19% to the body as a whole, based on the Combines Value Chart on page 604 of the AMA Guidelines, 5th Ed." RX-13.[4]

Employer additionally submitted a letter dated July 15, 2004 from Dr. Allen to Ms. Bass-Frazier, Claimant's attorney, stating, "In my medical opinion, the new injury was worse than what it would have been if he had not had the pre-existing injury and substantially, he is more disabled than he would have been had he only suffered injury in October." RX-14.[5]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

[4] Employer submitted this document as its next numbered exhibit on July 14, 2004. The Court received this document into evidence as RX-13.

[5] Employer submitted this document as its next numbered exhibit on July 29, 2004. The Court received this document into evidence as RX-14.

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do no contest jurisdiction under the Act. At the time of his injury, Mr. Richmond was engaged in welding construction of Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi at Northrop Grumman Ship Systems/Ingalls Operations. See JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Richmond reached maximum medical improvement on September 17, 2003. See JX-1. Dr. Allen, Mr. Richmond's treating physician, opined that Mr. Richmond had reached MMI on September 17, 2003. See RX-5, p. 12. Therefore, the Court accepts this date and finds that Mr. Richmond's back injury became permanent on September 17, 2003.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97

(1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Mr. Richmond is clearly unable to return to his regular employment as a welder at Northrop. Dr. Allen limited him to light duty work and restricted him from lifting greater than ten pounds, climbing, crawling, squatting, and kneeling. RX-5, p. 12. Northrop did not allow him to return to his regular position as a welder when Dr. Allen released him to work with these restrictions. TR 26-27. Therefore, the Court finds that Mr. Richmond has established a *prima facie* case of total disability.

The Court finds that Employer demonstrated suitable alternative employment in its November 2003 labor market survey. Mr. Richmond was notified of three potential employment opportunities in the Mobile/Pascagoula area based on his age, education, training and experience, and physical capabilities. Three security companies were accepting applications for positions that required only sitting, standing, walking and negligible lifting. See RX-9, p. 6. Vinson Guard Service and Securitas Security in Mobile were both accepting applications for full time security guard positions. Magnolia Security in Pascagoula was accepting applications for full and part time security guards. RX-9, p. 1-2. Dr. Allen assigned permanent restrictions to Mr. Richmond of no lifting greater than ten pounds with both hands, no climbing, crawling, squatting, and kneeling. RX-5, p. 12. Each employment opportunity in the November 2003 labor market survey complied with these restrictions. Based on the foregoing, the Court finds that Employer established the existence of suitable alternative employment in November 2003.

However, the Court finds that Claimant has proven a diligent search and a willingness to work during this period of time, which rebuts Employer's showing of suitable alternative employment. Mr. Richmond began searching for a job on his own accord in October 2003. In October, he went to the Alabama State Employment Office to look for a job and also applied with the Mobile County Personnel Board. He additionally contacted four other companies in search of employment. TR 29-36. In November 2003, he applied for each of the three job opportunities presented in Employer's labor market survey. TR 36-38. He continued searching December 2003 through February 2004, during which time he contacted nine companies and submitted three applications. TR 39-47. His last attempts were in March 2004, when he sought a cashier position at a Texaco Service Station and followed up on applications he had submitted to two other companies. TR 51. Mr. Richmond's testimony also reflects that he followed the recommendations given by Mr. Sanders, the vocational rehabilitation counselor who notified him of the security guard positions in November. Mr. Sanders recommended

that he follow up on his applications, discuss his capabilities and limitations with potential employers in a positive light and contact Northrop regarding the availability of light duty work. RX-9, p.6. Mr. Richmond followed up on his applications with the Alabama State Employment Office, the Mobile County Personnel Board, KAP Security and Mobile Greyhound Park. TR 47, 51-52. Mr. Richmond testified that he only discussed information about his injury when asked why he left his previous employment. TR 41. He also frequently checked with Ms. Melinda Wiley at Northrop for job openings. TR 39-40. After reviewing Mr. Richmond's job search efforts, the Court finds that he was diligent in seeking employment from October 2003 through March 2004. Therefore, Employer's November 2003 labor market survey fails to invalidate Mr. Richmond's claim of total disability.

The Court finds that Employer again demonstrated suitable alternative employment in its May 28, 2004 labor market survey. The survey included three potential employment opportunities in the Mobile area based on Mr. Richmond's age, education, training and experience, and physical capabilities. Mr. Sanders identified a full-time desk clerk trainee position with Econo Lodge in Mobile that paid $6.00 per hour, in which the physical requirements consisted of lifting five to ten pounds occasionally, sitting, standing, walking and stooping as well as infrequent bending. Mr. Sanders next indicated a position as a full-time cashier at Donovan's Car Wash in Mobile that paid $5.50 per hour. It had physical requirements of lifting five pounds occasionally, occasional pushing and pulling of five to ten pounds, occasional standing and walking with infrequent bending. Mr. Sanders also found that Standard Parking in Mobile was hiring a thirty-two plus hour parking lot attendant/cashier at a wage rate of $5.50 per hour, with physical requirements of sitting or standing, lifting five pounds occasionally, pushing and pulling five to ten pounds occasionally, and infrequent bending and stooping. RX-9, pp. 11-12. Dr. Allen assigned permanent restrictions to Mr. Richmond of no lifting greater than ten pounds with both hands, no climbing, crawling, squatting, and kneeling. RX-5, p. 12. Each employment opportunity in the May 28, 2004 labor market survey complies with these restrictions. Based on the foregoing, the Court finds that Employer established the existence of suitable alternative employment beginning on May 28, 2004.

As of May 28, 2004, the Court finds that Mr. Richmond did not prove that he was diligent in his job search efforts. At the formal hearing, Mr. Richmond testified that he did not contact any of the three jobs listed in the most recent labor market survey because he was receiving social security benefits, which he had been awarded in March 2004. TR 52-53. He further admitted that he had not applied for any jobs since being awarded social security benefits in March 2004. TR 67. Ronnie Smith's vocational rehabilitation report of March 2004 supports the Court's conclusion that Mr. Richmond ceased his diligent search for work. Mr. Smith placed Mr. Richmond's file in interrupted status as of March 2004 because Mr. Richmond had expressed that he felt physically incapable of returning to any form of work. RX-10. Because Employer established suitable

alternative employment at May 28, 2004, and Mr. Richmond failed to meet the burden of proving a diligent search and willingness to work at that time, the Court finds that Mr. Richmond's entitlement to total disability benefits ceased on May 28, 2004. The Court finds that as of May 28, 2004, Mr. Richmond is entitled only to partial disability. The Court finds that Mr. Richmond's partial disability is a § 8(c)(21) unscheduled injury, based on Dr. Allen's diagnosis of a back injury causing permanent partial impairment of thirteen percent to the whole body. See RX-5, p. 12; 33 U.S.C. § 908(c)(21).

The parties have stipulated that Mr. Richmond was paid temporary total disability benefits from November 20, 2002 through November 21, 2003 and temporary partial disability from November 22, 2003 through the present. See JX-1. Based on the findings of the Court discussed above, Mr. Richmond is entitled to temporary total disability from October 17, 2002 through September 17, 2003, the date when Mr. Richmond's disability became permanent. He is entitled to permanent total disability from September 18, 2003 through May 28, 2004, the date when Employer established suitable alternative employment. From May 29, 2004 through the present, Mr. Richmond is entitled to permanent partial disability.

In addition, § 10(f) of the Act provides that a claimant's compensation shall be adjusted annually to reflect the rise in the national average weekly wage in all cases of injury that result in permanent total disability or death. See 33 U.S.C. § 910(f). Accordingly, Mr. Richmond's status of permanent total disability from September 17, 2003 through May 28, 2004, entitles him to the annual cost of living increases pursuant to § 10(f) of the Act during this time period.

WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review BD., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of

the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)21 and 8(h) of the Act require that the wages earned in a post injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In the present case, Employer showed three suitable employment opportunities for Mr. Richmond. The Econo Lodge desk clerk trainee position was available 40 hours per week and paid $6.00 per hour, equating to a weekly wage of $240.00. The cashier position at Donovan's Car Wash was available 40 hours per week and paid $5.15 per hour, equating to a weekly wage of $206.00. The Standard Parking attendant/cashier position was available 32 hours per week and paid $5.50 per hour, equating to a weekly wage of $176.00. RX-9, pp. 11-12. The average of these weekly wages equates to $207.33. The Court finds that the proper wage-earning capacity for Mr. Richmond on May 28, 2004, the date suitable alternative employment was established, is $207.33 per week. This May 2004 weekly wage must be adjusted downward to account for inflation since the time of Mr. Richmond's work-related injury. The NAWW for May 2004 is $515.39, and the NAWW for October 2002 is $498.27. United States Dept. of Labor, Employment Standards Administration (November 15, 2004). Adjusting the May 2004 average weekly wage of $207.33 in consideration of the October 2002 NAWW, the Court finds that the proper wage-earning capacity for Mr. Richmond in October 2002 with respect to these positions is $200.44 per week.[6] Therefore, the Court finds that the proper wage-earning capacity for Mr. Richmond in October 2002 wages is $200.44 per week.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport

[6] The Court arrived at these figures by calculating the proportion: *x*/ $498.27 = $207.33/$515.39.

News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. Gilliam v. Addison Crane Co., 21 BRBS 91 (1987); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then §10(a) will apply. See Duncan v. Washington Metro. Area Transit and Auth., 24 BRBS 133, 136 (1990). In evaluating the threshold question of whether the employee has worked substantially the whole of the year, the Board has held that time taken for vacation is considered as part of an employee's time of employment. Duncan v. Washington Metro. Area Transit and Auth., 24 BRBS 133, 136 (1990); Waters v. Farmers Export Co., 14 BRBS 102, 106 (1981), *aff'd per curium*, 710 F.2d 836 (5th Cir. 1983). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976).

The Court finds, and the parties agree, that §10(a) applies because Claimant worked for Employer the whole of the year preceding the injury. Mr. Richmond's testimony that he typically worked eight hours per day, five days per week at Northrop establishes that his employment with Northrop was permanent and steady. TR 17. The record contains a "Daily Wage Recap Report," issued by the Payroll Department at Northrop/Ingalls, that supports Mr. Richmond's testimony and from which the Court can adequately determine an average daily wage. See CX-2.

Employer argues that Claimant's average daily wage should be determined by dividing his total earnings of the 52 weeks prior to the injury by the number of hours he worked that year to arrive at an average hourly wage, which is multiplied by eight hours to result in an average daily wage.[7] The Court declines to use this methodology as the Board has instructed that the language of § 10(a) requires dividing the employee's earnings for the fifty-two weeks preceding the injury by the number of days worked during that period to calculate the average daily wage. Baldwin v. General Dynamics Corp., 5 BRBS 579 (1977); Tangorra v. National Steel & Shipbuilding Co., 6 BRBS 472 (1977); Cippolone v. General Dynamics Corp., 7 BRBS 94 (1977).

[7] Employer divides $38,113.89 by 2097.2 hours to arrive at an hourly wage of $18.17, and then multiplies $18.17 by 8 hours to arrive at a daily wage of $145.39. Employer submits that Claimant's average weekly wage is $762.95. ($145.39 x 260 days / 52 weeks = $726.95).

Claimant employs the appropriate methodology in its calculation.[8] However, the Court disagrees with the figures used by Claimant to represent total wages for the 52 week period preceding the injury and number of days worked during that period. The "Statement of Earnings" issued by Northrop shows "gross dollars" of $38,682.91 earned for pay periods October 15, 2001 through October 20, 2002. CX-2, p. 6. The Court finds that the figure that accurately reflects Mr. Richmond's earnings during the 52 week period prior to his October 17, 2002 injury is $38,278.35. The Court obtained this amount by subtracting wages earned on October 15, 2001, October 16, 2001 and October 18 through October 20, 2002.[9] See CX-2, p. 12, 59. The Court does not agree with Claimant's use of 232 days to represent the number of days worked by Mr. Richmond during the 52 week period. Claimant arrived at 232 days by excluding all vacation days and holidays. The Court does not agree with this valuation. As Claimant's holiday and vacation day pay is included in the calculation of his total wages during the 52 week period, they should also be included in calculating the total number of days Claimant worked. The calculation mandated by § 10(a) "aims at a theoretical approximation of what a claimant could ideally have been expected to earn" in the year prior to his injury. Duncan, 24 BRBS 133 (1990). Claimant simply used his vacation days while receiving his normal pay for a regular day's work; he did not "sell back" his vacation days to Employer for compensation. Similarly, Mr. Richmond would receive a regular day's pay on a holiday. In Ingalls Shipbuilding, Inc. v. Wooley, 204 F.3d 616 (5th Cir. 2000), the Fifth Circuit charged the ALJ with making the fact findings to determine whether vacation compensation counted as a "day worked" or as a day "sold back" for additional pay. In this case, the Court finds that Claimant's vacation compensation counts as "days worked" because the "Daily Wage Recap Report" clearly reflects that each time Mr. Richmond received vacation compensation, he was absent from work the equivalent number of days. See CX-2, p. 12-60. The Court agrees with Claimant that bonus pay is not considered a "day worked," because it reflects a sum of money that was awarded to an employee who worked forty consecutive working days. Based on the "Daily Wage Recap Report," the Court finds that the correct number of days worked by Mr. Richmond, including vacation days and holidays, but excluding bonus pay, is 256 days. See CX-2, p. 12-60.

[8] Claimant divides $38,417.15 by 232 days to arrive at an average daily wage of $165.59. Claimant submits that his average weekly wage is $827.95. ($165.59 x 260 days / 52 weeks = $827.95).

[9] Claimant subtracted the wages earned by Claimant on October 15, 2001 and October 16, 2001, the two days prior to his accident, from his gross wages to obtain $38,417.15. See CX-2, p.6. However, Claimant failed to subtract his earnings of October 18 through October 20, 2002.

The Court finds that Claimant's average weekly wage is $747.60, based upon the following calculations mandated by § 10(a) for a five day worker: $38,278.35 (total wages) divided by 256 (days worked) = $149.52 average daily wage; $149.52 (average daily wage) x 260 (days for a five day worker) = $38,875.20 average annual wage; $38,875.20 (average annual wage) divided by 52 weeks = $747.60 average weekly wage.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in § 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. § 908 (f) and § 944. To be entitled to compensation under § 8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an "existing permanent partial disability" before the employment injury; (2) that the permanent partial disability was "manifest" to the employer; and (3) that the current disability is not due solely to the employment injury. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries Inc., 14 BRBS 974, 976 (9th Cir. 1982), cert. denied, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed. 2d 951 (1983); 33 U.S.C. § 908(f)(1).

With respect to the requirement of an existing permanent partial disability, the term "disability" in § 8(f) can be an economic disability under § 8(c)(21) or one of the scheduled losses specified in §§ 8(c)(1)-(20), but it is not limited to those cases alone. C&P Tel. Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977). "Disability" under § 8(f) is necessarily of sufficient breadth to encompass those cases wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of an employment-related accident and compensation liability. Id.

The evidence in this case does not establish that Mr. Richmond had an existing permanent partial disability prior to his October 17, 2002 work-related back injury at Northrop. He did not have an economic disability under § 8(c)(21) or a scheduled loss specified in §§ 8(c)(1)-(20). Employer argues that Mr. Richmond previously sustained a back injury in May 2000, a right elbow injury in December 1996, and a calf injury in May 1993, which would cause a cautious employer to dismiss the claimant due to increased risk of compensation liability. Employer's argument fails because the mere fact of a past injury does not establish disability. There must be a serious, lasting physical problem. See Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991); Director, OWCP v. Campbell Indus., 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985). The minimal medical records

that Employer has offered into evidence merely establish that these injuries did in fact occur; they do not suggest that Claimant's pre-existing injuries were of a serious nature. The medical records establish that Claimant's prior back injury was not assigned an impairment rating and that he was released to work with no restrictions. RX-12, p. 6-7. The records regarding Mr. Richmond's 1993 calf injury are ambiguous. There is one letter from Dr. Rutledge stating that the injury does not increase Mr. Richmond's 1988 ten percent impairment rating to his left lower extremity, but no record of the 1988 injury is included in evidence. RX-12, p. 10. Another letter from Dr. Rutledge issues work restrictions of no climbing, squatting, stooping or kneeling. RX-12, p. 8. The Court questions the permanency of these restrictions, given that Mr. Richmond was working unrestricted as a welder at Northrop at the time of his most recent injury and given the nominal amount of medical evidence submitted regarding this injury. The medical records also reflect that Mr. Richmond's elbow injury was given a two percent impairment rating to his right upper extremity and no work restrictions. RX-12, p. 14. Based on the absence of work restrictions and the minor impairment ratings of these injuries, the Court finds that these injuries do not amount to serious; lasting physical disabilities that would cause a cautious employer to dismiss the claimant due to increased risk of compensation liability.

Additionally, Employer has not met the requirement under § 8(f) of establishing that Mr. Richmond's current disability is not due solely to his October 17, 2002 employment injury. When the employee is permanently partially disabled, the employer must show that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." Two R. Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990). The Court finds that Employer has not carried its burden of persuasion in this regard. Employer submits a document where Dr. Allen agrees with a statement supplied by Employer's claims adjuster that Mr. Richmond's previous injuries combined with the effects of his most recent back injury to render him materially and substantially more disabled than he would have been as a result of the back injury alone. RX-13. He also agrees with a second statement that totals Mr. Richmond's impairment ratings to reach 19% impairment to the body as a whole. RX-13. Employer additionally submitted into evidence a letter where Dr. Allen states, "In my medical opinion, the new injury was worse than what it would have been if he had not had the pre-existing injury and substantially, he is more disabled than he would have been had he only suffered injury in October." RX-14. Employer submits only these conclusory statements by Dr. Allen that are unsupported by any medical analysis or explanation. Employer submitted no evidence that Dr. Allen even reviewed Mr. Richmond's past medical record from these injuries before agreeing to these statements. Due to the absence of a suitable medical report explaining how Mr. Richmond suffered increased disability due to his pre-existing injuries, the Court finds that Employer did not meet this§ 8(f) requirement. Given the above analysis, the Court finds that Northrop has not met the § 8(f) requirements and is not entitled to relief under that section.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993).

In this case, Employer voluntarily paid Mr. Richmond temporary total disability from November 20, 2002 through November 21, 2003 and temporary partial disability has been paid from November 22, 2003 through the present. See JX-1. This Court has awarded Mr. Richmond permanent total disability from September 17, 2003 through May 28, 2004 and permanent partial disability from May 29, 2004 through the present. Based on the Court's award of greater compensation than compensation paid by Employer, the Court finds that Claimant's attorney is entitled to attorney's fees from Employer.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from October 17, 2002 through September 17, 2003 and permanent total disability from September 18, 2003 through May 28, 2004, based on an average weekly wage of $747.60. Such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act. The cost of living adjustment shall be effective retroactively to September 17, 2003.

2) Employer/Carrier shall pay to Claimant compensation for permanent partial disability from May 29, 2004 and continuing, based on an average weekly wage of $747.60 to be reduced by a residual wage-earning capacity of $200.44.

3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

4) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

5) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

6) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge